Neutral Citation Number: [2022] EWHC 1105 (QB)

Case No: QB-2021-003576, QB-2021-003626, QB-2021-003737

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2022

Before :

MR JUSTICE BENNATHAN

- -

Between :

NATIONAL HIGHWAYS LIMITED	**Claimant**
- and -	
(1) PERSONS UNKNOWN CAUSING THE BLOCKING OF, ENDANGERING, OR PREVENTING THE FREE FLOW OF TRAFFIC ON THE M25 MOTORWAY, A2, A20 AND A2070 TRUNK ROADS AND M2 AND M20 MOTORWAY, A1(M), A3, A12, A13, A21, A23, A30, A414 AND A3113 TRUNK ROADS AND THE M1, M3, M4, M4 SPUR, M11, M26, M23 AND M40 MOTORWAYS FOR THE PURPOSE OF PROTESTING	**Defendants**
(2) MR ALEXANDER RODGER AND 132 OTHERS	

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Myriam Stacey QC, Admas Habteslasie and Michael Fry (instructed by **DLA Piper LLP UK**) for the **Claimant**
Owen Greenhall (Intervening) (instructed by **Hodge Jones & Allen**)

Hearing dates: 4th and 5th May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BENNATHAN

Mr Justice Bennathan :

1. The Claimant, National Highways Limited ["*NHL*"], seeks summary judgment and various remedies in 3 sets of proceedings brought in relation to protests carried out on the Strategic Road Network ["*SRN*"] under the banner of Insulate Britain ["*IB*"]. The Claimant was represented by Myriam Stacey QC, Admas Habteslasie and Michael Fry, of Counsel. I express my gratitude for all the assistance I have received from all the lawyers in the case.

2. IB is a protest group made up of people whose aims include two demands. First, that the Government undertakes to insulate all social housing in the UK by 2025, and second to do the same for all other housing by 2030. The twin aims behind those demands, as described by IB, are to save the planet from disastrous climate change and to soften the blow of rising fuel prices. The means employed by IB have included protests blocking roads, and protest designed to disrupt other parts of civil society such as various magistrates courts. I should stress that these are all peaceful protests. None of the named Defendants were represented but Ben Horton, who had been a named Defendant, attended at Court and made some submissions about costs. I also made an order under CPR 40.9 and thereafter heard argument from Owen Greenhall of Counsel, who appeared to make submissions on behalf of a person who took an interest in the litigation.

3. There have been 3 interim injunctions granted in 3 sets of proceedings:
   (1) On 21 September 2021 Lavender J granted an order banning protests on M25, and a claim form for an action in trespass and nuisance was lodged on 22 September.
   (2) On 24 September 2021 Cavanagh J granted an order banning protests on parts of the SRN in Kent, and a claim form for an action in trespass and nuisance was lodged on the same day.
   (3) On 2 October 2021 Holgate J granted an order banning protests on certain M25 feeder roads, and a claim form for an action in trespass and nuisance was lodged on 4 October.

4. A number of contempt of court applications for breaches of the terms of those injunctions led to protestors being imprisoned and subject to lesser sanctions, in the decisions in *NHL v Heyatawin and others* [2021] EWHC 3078 (QB), *NHL v Buse and others* [2021] EWHC 3404 (QB), and *NHL v Springorum and others* [2022] EWHC 205 (QB).

5. The Claimant sought summary judgment against 133 named Defendants. Those named Defendants have all been arrested by various police forces in operations connected to IB protests, whereafter their details were notified to the Claimant under disclosure provisions of the interim injunctions. In addition to summary judgment, the Claimant sought:
   (1) A final injunction in terms similar, but not identical to, to those granted in the interim orders, and
   (2) A declaration that the use of the SRN for protests is unlawful, and
   (3) Damages, though the Claimant stated in its Skeleton Argument that it was not pursuing damages against any of the Defendants, and
   (4) Costs.

6. There are certain procedural orders the Claimant also sought, namely to join the 3 sets of proceedings and to order alternative service. The former is uncontroversial, and I made that order, the latter is less straightforward and I will address that later in this judgment.

7. The hearing in this case took place on 4 and 5 May 2022. At the end of the hearing I announced some decisions and reserved judgment on others; this judgment sets out the decisions on reserved issues and explains my reasons for all the decisions I have, or had, to take. If any party seeks to appeal, or to vary the order, the handing down of this judgment should be seen as the date of the decision for the purposes of the periods to make any such applications.

8. The injunction the Claimant sought covers:
   (1) The M25 motorway. The well-known 117 mile long motorway that encircles London.
   (2) The M25 feeder roads [in slightly wider terms than that granted by Holgate J], as listed in the draft order. To take one example, A1 from A1(M) to Rowley Lane: one of the main roads in and out of London to the North, and a road used to divert traffic when other roads, such as the M1, are closed or blocked.
   (3) The Kent roads include the M2, M20, A2 and A20. These roads serve Dover, one of the busiest ports in the UK.

9. The evidence the Claimant relied on is set out in the witness statements of Nicola Bell and Laura Higson.

10. Nicola Bell is the Regional Director for NHL's Operations [South East Region]. In her witness statement dated 22 March 2022 she describes the protests that began on 13 September 2021, in which protestors seemingly affiliated to IB blocked motorways by sitting on the carriageways and by gluing themselves to the roadway. She described their activities as "*dangerous and very disruptive*" though she provided no details of any actual injury to anyone. Ms Bell also set out the importance of the roads that the Claimant seeks to protect by way of injunctive relief.

11. Laura Higson is a lawyer at DLA Piper, NHL's solicitors. In her witness statement of 24 March 2022, she set out the protests that had occurred:
   (1) On 13 September 2021, protestors blocked slip roads and the carriageway around five junctions on the M25.
   (2) Further protests took place on 15 September and 17 September 2021.
   (3) On 21 September 2021 protests on the M25 escalated, including by blocking the main carriageway of the M25 in both directions.
   (4) On 24 September 2021 protestors blocked the A20 in Kent and subsequently the port of Dover.
   (5) On 29 September 2021 protesters blocked, for the second time, Junction 3 of the M25.
   (6) On 30 September 2021, protestors glued their hands to the ground at Junction 30 of the M25.
   (7) On the morning of 1 October 2021, IB reported that around 30 protestors from IB blocked Junction 3 of the M4 and Junction 1 of the M1.
   (8) On 4 October 2021, IB reported that "*54 people from Insulate Britain have blocked three major routes in the capital*", with protestors blocking the Blackwall

Tunnel, Hanger Lane, Arnos Grove and Wandsworth Bridge [all of which do not fall within the SRN].

(9) On 8 October 2021, protestors from IB blocked the M25 at Junction 25.

(10) On 13 October 2021, IB protests took place on the M25.

(11) On 27 October 2021, IB protestors blocked part of the A40 in West London and a roundabout in Dartford.

(12) On 29 October 2021, 19 IB protestors disrupted traffic at two locations on the M25. 10 protestors walked between lanes of oncoming traffic between Junction 28 and Junction 29 of the M25, and a further 9 protestors entered onto the motorway between Junction 21 and Junction 22.

(13) On 2 November 2021, around 60 IB protestors disrupted traffic on Junction 23 of the M25

(14) There have been other protests from time to time in central London. For example, on 20 November 2021 about 400 people blocked Lambeth Bridge.

12. Ms Higson also addressed the risk of future protests. In her 24 March statement, she set out a press release in the name of IB, dated 7 February 2022:

> We did not take part in this campaign to start an insulation brand. We did not cause you disruption to make history as Britain's quickest growing advertising campaign. We took part to force our government to stop failing its people. We will continue our campaign of civil resistance because we only have the next two to three years to sort it out and prevent us completely failing our children and hitting climate tipping points we cannot control.
>
> Now we must accept that we have lost another year, so our next campaign of civil resistance against the betrayal of this country must be even more ambitious. More of us must take a stand. More of you need to join us. We don't get to be bystanders. We either act against evil or we participate in it. We haven't gone away. We're just getting started.

13. Ms Higson reported a further IB posting spoke of plans for a "*Rave on the M25*" on *Facebook*, beginning at 12pm on 2 April 2022 and ending at 4am on 3 April 2022. This event does not seem to have taken place. Ms Higson then set out a series of news releases that mainly concern another group, "*Just Stop Oil*" ["JSO"] with whom IB wrote of having formed an alliance. The focus of the JSO posts was very much on acting so as to interfere with various parts of the oil industry and while there have been many such protests reported in the press and other media, and the Courts have dealt with a number of applications by Oil companies for injunctions, few have targeted the SRN.

14. Ms Higson also detailed the attitude of at least some protestors towards the Courts in general and injunctions in particular. I can summarise those public comments as expressing views that range from defiance to complete disinterest. Those comments by people associated with IB were put in evidence by the Claimant in support of the application for an injunction but do not seem to me to be particularly relevant to that subject: the fact people may not obey an injunction is not a basis for the Court to refuse to make an order [see Lord Bingham in *South Buckingham District Council v Porter* [2003] 2 AC 558 [at 32]], but nor is disrespect for the Court process a reason

to do so. Where that attitude may be of relevance is when I come to consider the evidential basis for the applications for summary judgment.

15. Finally, in her first statement, Ms Higson reported on a number of incidents whereby IB protests have led to a hostile reaction from other road users:
    (1) A BBC News report of 4 October 2021 reported drivers clashing with IB protestors near the Blackwell Tunnel during a protest that had been timed to take place during the morning rush hour, quoting a road user whose mother was in an ambulance on the way to hospital.
    (2) A video posted on the Daily Express's website showed a van driver attempting to run over an IB Protestor.
    (3) A news report of 13 October 2021 recorded, in relation to an IB Protest on the M25 that day, tense scenes between road users and IB protestors, including, "*a female protester was almost run over after stopping in front of a blue Hyundai car*" and "*a mother getting out of her black Range Rover and arguing with those gathered around her car. "Move out of the f****** way, my son needs to get to school*," she told demonstrators.
    (4) A news report of 19 October 2021 records an incident where "*two grey haired protesters on their backsides* [were] *being pulled off the road by two men - presumably drivers frustrated at the blockage*"
    (5) A news report of 27 October 2021 records that an IB protestor had ink thrown in their face during a protest on the M25.

16. In a further statement dated 25 April 2022, Ms Higson deals with three topics:
    (1) The Claimant's attempts to serve the summary judgment application on the named Defendants. In the main, and with some acknowledged exceptions I will deal with later, it seems to me that the Claimant has served the Defendants sufficiently for the application to proceed.
    (2) She provides some further details from the police, in respect of a few Defendants who have served replies or defences, of their activities.
    (3) Ms Higson also sets out further reasons why, on the Claimant's case, there is a sound basis to fear further actions by the Defendants and persons unknown: the various press releases are almost entirely those of JSO and speak of actions at oil terminals and such premises rather than the SRN. There have, however, been distinct and more recent signs of the threat of a renewal of the type of protests that would be caught by the injunction sought. Interviews in the media in March and April spoke of vowing "*to cause more chaos across the country in the coming weeks*" and that there was going to be "*a fusion of other large-scale blockade-style actions you have seen in the past*".

17. Of the 143 Defendants originally listed, the Claimant did not seek to continue the action against 10 because of troubles with serving the claim upon them and other issues. I consequently dismissed those claims. Of the remaining 133 named Defendants, 24 have been subject to findings of contempt on the basis of substantial evidence of their taking part in protests blocking the M25 [see *NHL v Heyatawin and others* [2021] EWHC 3078 (QB) at 46, *NHL v Buse and others* [2021] EWHC 3404 (QB) at 26, and *NHL v Springorum and others* [2022] EWHC 205 (QB) at 30]. Thus, for some purposes of the decisions I had to take the 133 remaining Defendants could

be seen as 2 groups; the 24 who have been sanctioned for contempt ["*the 24*"] and the 109 who have not ["*the 109*"].

18. The main issues I had to consider are:
    (1) Whether to make an order under CPR 40.9.
    (2) Whether to give summary judgment against some or all of the Defendants.
    (3) Whether to make a further injunction, and if so in what terms.
    (4) Whether to abridge the normal rules of service.
    (5) Whether to make disclosure orders binding on the police.
    (6) Whether to make the declaration sought by the Claimant.
    (7) Whether to make an order for damages or costs.

Rule 40.9

19. In advance of the hearing Hodge, Jones and Allen Solicitors served witness statements from Alice Hardy, a Solicitor in the firm's Civil Liberties Department and Jessica Branch, an environmental activist who is not a named defendant and has not attended any IB protests. Those statements argued that the order sought by NHL was overly wide and would have a chilling effect on protests generally. Ms Hardy also expressed concerns on behalf of a campaigner for greater safety measures to protect cyclists who, on occasions, has demonstrated or otherwise campaigned on roads, including of the type that would be caught by NHL's draft order. Hodge Jones and Allen also instructed Counsel, Mr Greenhall, who submitted a Skeleton Argument and attended at the hearing. This raised the issue of whether I should permit Ms Branch to advance argument by way of Mr Greenhall's submissions. The legal route for this to happen is rule 40.9 of the Civil Procedure Rules that states as follows:

> A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied

20. On its face, the terms of rule 40.9 are strikingly wide. There is no guidance within the rule itself, and no appellate guidance of which I have been made aware, as to how a judge should decide such applications. Ms Stacey, for the Claimant, submitted that I should not permit Ms Branch to make submissions unless and until she was joined as a Defendant, not least as to do otherwise would equip her with the privilege of a participant without the risk of an adverse costs order for unsuccessful participation. Ms Stacey stressed that the words "*directly affected*" were the only limit on the rule and suggested that Ms Branch was not so affected. In addition, Ms Stacey drew my attention to the order of Chamberlain J who, in his directions [paragraph 14] for this hearing, stated:

> Any person applying to vary or discharge this order must provide their full name and address, an address for service, and must also apply to be joined as a named defendant to the proceedings at the same time (to the extent they are not already so named).

21. Ms Branch's witness statement expresses a general view that the terms of the order sought are so wide as to prevent protests that are lawful and, more specifically, sets out her concern that they might catch people such as her who, while not involved in IB or any of its protests, might protest near some of the many roads specified in NHL's draft order and find herself inadvertently caught up in contempt proceedings. I decided that I should grant the rule 40.9 application on the following grounds:

(1) The scenario suggested by Ms Branch, in her specific concern, is not fanciful and would amount to a sensible basis to regard her as "*directly affected*".
(2) Even absent that most direct connection, in a case where an order is sought for unnamed and unknown defendants, and where [as here] Convention rights are engaged, it is proper for the Court to adopt a flexible approach and a general concern by a person concerned with the political cause involved could, perhaps only just, fit within the term. To take an example far removed from the facts of this case, a member of a proselytising religious group who only attended their local place of worship *might* nonetheless be seen as directly affected by an order banning his co-religionists from travelling to seek converts.
(3) In a case where the Court is being asked to make wide ranging orders and, but for a successful rule 40.9 application, would not hear any submissions in opposition it seemed to me desirable to take a generous view of such applications.

22. While reluctant to vary the order made by another Judge in advance of the hearing it did seem to me, with respect, that Chamberlain J's order was at odds with rule 40.9 which specifically allows for the possibility of participation by non-parties, in other words those who are not defendants. I therefore varied that order to permit Mr Greenhall to advance submissions on behalf of Ms Branch.

23. Before passing on to other matters I should emphasise this was a decision taken on the facts of this case and does not purport to lay down an immutable principle. There may well be other protest cases where it is not appropriate to grant such an application. In addition, if the rule was used as a mechanism to mount arguments that took up excessive time, were repetitious or did not assist the Court [none of which criticisms can be levelled at Mr Greenhall's measured and focused submissions], then there are ample and robust case management powers to stop that happening.

Summary judgment

24. In setting out my reasoning on this aspect of the case I need to rehearse some fundamental underlying principles. The need for this approach occurred because of the course of the hearing. I had indicated my concerns about the evidential basis for the summary judgment applications in respect of some of the Defendants. At that stage Ms Stacey QC, on behalf of NHL, argued that their cause of action was, perhaps amongst other things, for an injunction and that the evidence advanced by the Claimant could be a basis for my giving summary judgement in favour of a final injunction, on the basis that even if I doubted there was sufficient evidence to find tortious liability, the same evidence could and should be seen as an ample basis to show the justification for granting a final injunction. After entertaining those submissions in argument, I reflected on them overnight, then rejected them for the following reasons.

25. An injunction is not a cause of action, it is a remedy. An application for an injunction can only succeed if it is advanced as a necessary relief for an underlying substantive claim. In my view this is basic and beyond debate:
(1) In *Injunctions* [Bean et al, Sweet and Maxwell, 14th Edition, at page 4] under the heading, "*Requirement of a substantive claim*" the authors write, "*There is one overriding requirement: the applicant must normally have a cause of action in law*

entitling him to substantive relief. An injunction is not a cause of action (like a tort or a breach of contract) but a remedy (like damages)"

(2) In *Fourie v Le Roux* [2007] 1 WLR 320 [2] Lord Bingham stated that injunctions "*are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign*". In Lord Scott's speech in the same judgment [30], he also spoke of the need for an underlying cause of action, albeit as a rule of practice rather than a matter of jurisdiction.

26. Summary judgment under CPR part 24 is available for a cause of action or for an issue within that cause of action, but not for a remedy. This is not to say that Judge granting summary judgment may not also grant the consequent relief, but she or he can only do so after the cause of action has been resolved. Although the word "*trial*" is at times used to describe an assessment of a remedy [see, for example, White Book 2022 at 12.0.1] in both the CPR 24 and the accompanying Practice Direction the language is consistent with the narrower meaning, namely a trial of a cause of action. Further, in the context of this case it would make no sense to describe an injunction as "*final*" if the underlying cause of action was yet to be resolved.

27. On the basis of the approach I have described, I turned to consider the applications for summary judgment in the case of the 24 and the 109. The test I had to apply is set out in CPR 24.2:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if:
> (a) it considers that –
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

28. The causes of action pleaded by the Claimant are trespass, public nuisance and private nuisance. I will consider the basis for trespass more fully later in this judgment but for these purposes I summarise the law [based primarily on *DPP v Jones* [1999] 2 AC 240 and *DPP v Ziegler* [2022] AC 408] as being that a protestor using a highway *may* have a defence to an action for trespass but will not do so, to address the specifics relevant to my determination of these applications, if they have protested by obstructing traffic on the M25.

29. Mummery LJ described private nuisance in *West v Sharp* (1999) 79 P&CR 327 at 332, as follows: "*Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him*".

30. Obstruction of the highway, for the purposes of public nuisance, is described in Halsbury's Laws, 5th ed. (2012) at para. 325 where it is said:
(1) whether an obstruction amounts to a nuisance is a question of fact;
(2) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance;
(3) generally, it is a nuisance to interfere with any part of the highway; and
(4) it is not a defence to show that although the act complained of is a nuisance with regard to the highway it is in other respects beneficial to the public.

31. I note that neither public nor private nuisance have been subject to an appellate review in the light of the Article 10 and 11 rights of protestors, as was carried out for trespass in *DPP v Jones* and other cases to which I have been referred. It seems to me both torts will have a potential defence if the actions of protestors cause *some* interference on a road but, once more moving from the general to the specific, such a defence would not render obstructing traffic on the M25 a lawful, non-tortious, act.

32. With those definitions in mind and applying the broad hearsay provisions of section 1 of the Civil Evidence Act 1995, I found there was sufficient evidence to give summary judgement against the 24 based on the decisions in *NHL v Heyatawin and others*, *NHL v Buse and others* [2021] EWHC 3404 (QB), and *NHL v Springorum and others* [2022] EWHC 205 (QB). Although the Court in those cases was deciding whether there had been breaches of an injunction, rather than the commission of torts, the factual summaries in those cases gives sufficient details for me to conclude there is no realistic basis to believe there would be any issue were there to be a trial of those defendants.

33. The position of the 109 is different. The only basis offered by the evidence supplied by the Claimant was within the witness statement of Laura Higson [at her paragraph 51]. The 28 sub-paragraphs are similar, so I take only the first 2 to illustrate their general nature:

> 51.1 On 13 September 2021, 18 of the Named Defendants were arrested by Hertfordshire Constabulary in connection with a protest which took place under the banner of IB. Of those arrested, all were arrested under suspicion of wilful obstruction of the highway, and 6 under suspicion of conspiracy to cause a public nuisance. I am not personally presently aware of the current status of any prosecutions.
> 51.2 On 13 September 2021, 10 of the Named Defendants were arrested by Kent Police in connection with an IB protest. Each of the 10 individuals were arrested under suspicion of wilful obstruction of the highway and conspiracy to cause a public nuisance. All have been charged with conspiracy to cause a public nuisance.

34. At no stage in this part of her witness statement does Ms Higson identify which defendant was arrested on what date. There are no details of the activities that led the police to arrest. There has been one conviction in Kent for an offence of criminal damage but there is no description of what the unidentified arrestee had done. In other sub-paragraphs Ms Higson states that the police took no further action against some of those arrested on some occasions. Ms Stacey sought to support Ms Higson's evidence by pointing out that none of the defendants, with 2 exceptions I will come to

shortly, had served a defence to NHL's claim. In the hearing I was told that the reason [or at least one reason] for the lack of specificity was "*GDPR*": I struggled to understand that explanation given that there have been 3 successful contempt applications wherein defendants were named and their detailed activities set out, given the terms of the disclosure orders previously made allow for arrestees' details to be deployed in this litigation, and given that in her second witness statement Ms Higson gives the names, dates and [at least some] details of 3 of those who were arrested but later did respond with defences to the claim. Ultimately, however, the reasons for how the Claimant chose to present their case is a matter for them, not me.

35. The task I had to undertake was to assess the material put before me and decide whether the Claimant had shown there was no real prospect of a successful defence to the claims of the 109 Defendants. In my judgment the evidence supplied was manifestly inadequate, given:
    (1) I would have to be satisfied in each case. As a matter of common sense, it is highly likely that many of the defendants *have* committed the 3 torts alleged but I am not able to take a broad brush approach that "*lumps together*" all 109 in a case where I am dealing with important and fundamental rights.
    (2) The fact a protestor has been arrested may well mean they have been obstructing a road so as to commit the torts, but it is entirely realistic that, on a few occasions, the police's reasonable suspicion [the requirement for an arrest] was misplaced or mistaken. English law does not proceed on the basis that a person arrested is assumed to be guilty, even [as here] on a balance of probabilities test.
    (3) One of the defendants who has replied states that she is a film maker who was videoing protestors blocking the M25 as part of a media project. She attached a letter to her reply which showed the Crown Prosecution Service have discontinued prosecuting her on the basis that it is not in the public interest to do so. Her situation is both a case that clearly raises an issue for any trial and one that serves as an example that might apply to some of the other 109.
    (4) In the third committal application [*NHL v Springorum and others*, at 21-24] the Court dismissed the application in respect of 3 defendants on the basis that they had been arrested while on a pavement and had not caused any obstruction of any traffic; I am conscious that the Court was dealing with breaches of an injunction, not tortious liability, but I doubt that the activities of those 3 could amount to the latter. Once more, this serves as an obvious example that the mere fact of an arrest does not necessarily establish the tortious conduct.
    (5) The Claimant did not make any application for default judgments but sought to rely on the general lack of any defences in support of its application for summary judgment. In some situations, the failure to serve a defence could provide such evidence but, in my view, this is not such a case, given the general attitude of disinterest in Court proceedings as described in Ms Higson's witness statement, as above. There is an illustration of the same point in the contempt hearing described above, where 2 of the 3 Defendants expressly disassociated themselves from the submission that they had not breached the injunction and were presumably disgruntled to find the application to sanction them dismissed.
    (6) In her second witness statement Ms Higson gives some further details of 3 of the arrests [the then-defendants Matthew Tully, Ben Horton and Nicholas Till]. Of those 3, Mr Horton has been abandoned as a defendant. Those paragraphs of Ms Higson's statement do not provide a sufficient basis to exclude any realistic possibility that the remaining 2 have a defence to the claim.

36. In the light of the evidence called I granted summary judgment in respect of the 24 and dismissed the application in the case of the 109. The consequence is that the injunctions I was persuade to grant are both final, for the 24, and interim, for the 109 and the unknown defendants. In the light of the Court of Appeal's decision in *London Borough of Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13, I did not view a hybrid injunction as impossible and my preference was the simplicity of the same, but Ms Stacey has expressed a firm preference for separate final and interim injunctions, and I did not think it right to deny the Claimant their choice as to the structure of the relief. Nonetheless, I consider the requirements of both injunctions in a single section of what follows.

Injunction

37. The well-established test for the grant of an interim injunction was described in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The first 2 aspects, whether there is a serious question to be tried and whether damages would be an adequate remedy were no injunction granted, are easily met in this case: the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk and the impracticality of obtaining damages on that scale from a diverse group of protestors, some of whom may have no assets, damages would obviously not be an adequate remedy. The balance of convenience, however, is not so simply resolved in a case involving a largely anticipatory injunction, unidentified defendants, and the human rights of both sides: in my view that balance can be achieved in this case by modifying the terms of the order from those in the Claimant's draft. I explore the reasons for that being required, below.

38. The injunctions sought are anticipatory injunctions. In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch) Marcus Smith J summarised the effect of 2 decisions of the Court of Appeal on this topic, and I adopt his summary with gratitude. The questions I have to address are:
    (1) Is there a strong possibility that the Defendants will imminently act to infringe the Claimants' rights?
    (2) If so, would the harm be so "*grave and irreparable*" that damages would be an inadequate remedy. I note that the use of those two words raises the bar higher than the similar test found within *American Cyanamid*.

39. Mr Greenhall pointed out that the IB protests described by NHL were all in 2021 and there has been no repetition this year. This is a fair point, but it is outweighed by some of the public declarations made on behalf of IB. Once a movement vows "*to cause more chaos across the country in the coming weeks*" and threatens "*a fusion of other large-scale blockade-style actions you have seen in the past*", the Claimant must be entitled to seek the Court's protection without waiting for major roads to be blocked. In my view the scale of the protests being discussed, and those that have already occurred, are sufficient to meet the heightened test of harm so "*grave and irreparable*" that damages would be an inadequate remedy.

40. Section 12(2) of the Human Rights Act 1998 would prevent me from granting an injunction unless I was satisfied that the Claimant had taken all practicable steps to

notify the defendants: in this case I am satisfied of that in the cases of the named defendants and will modify the terms of the service of the injunction to avoid rendering unknown people liable until they too have been made aware of the order. Section 12(3) bans the restraint of "*publication*" by way of an interim injunction unless the Court is satisfied that the Claimant is likely to succeed in stopping publication at any final trial. There is an argument that protests such as those carried out by IB should not be considered as "*publication*" at all but given the Court of Appeal's decision in *Ineos* [as below] I proceed on the basis I should consider them as such. Nonetheless, I am satisfied that the type of "*publication*" that will be banned by the order I am prepared to make will be likely to be similarly banned at any trial.

41. Injunctions against unidentified defendants were considered by the Court of Appeal in the cases of *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 ["*Ineos*"] and *Canada Goose Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 ["*Canada Goose*"]. I summarise their combined affect as being:
    (1) The Courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].
    (2) The terms must be sufficiently clear and precise to enable persons potentially effected to know what they must not do [*Ineos* and *Canada Goose*].
    (3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights [*Canada Goose*].

42. The balance between the competing rights of protestors and others have been considered in a series of cases. In *DPP v Jones* [1999] 2 AC 240 the House of Lords allowed an appeal by protestors convicted on the basis they had taken part in a "*trespassory assembly*". The speeches in the judgment make clear that protests could be a reasonable use of a public highway. Although the European Convention was discussed, the Human Rights Act 1998 was not yet in force and that decision, in my respectful view, has to be read with a degree of caution given the more recent case of *Ziegler*, to which I now turn.

43. In *Director of Public Prosecutions v Ziegler* [2022] AC 408 protestors had blocked a road leading to a venue where an arms fair was being held, by sitting in the road and by attaching themselves to heavy objects. They had been arrested and prosecuted for obstructing the highway under section 137 of the Highways Act 1980, which offence has a "*lawful excuse*" defence. The District Judge hearing the trial dismissed the charges on the basis that, having weighed up considerations that pulled either way including the protestors' Article 10 and 11 rights, he concluded the prosecution had failed to negate the statutory defence advanced by the defendants. The Divisional Court allowed an appeal against the decision of the District Judge. The Supreme Court then allowed the further appeal and restored the dismissals. *Ziegler* was an important, perhaps a landmark, decision about the right to protest, but its effect should not be misunderstood: the Court did not declare that blocking roads was henceforth a legitimate and lawful form of political action, but that on occasions it might not be a crime under that section of that act. It is notable that the Supreme Court discussed and approved a list of considerations of the detailed facts that a judge should weigh in such cases, before reaching a decision.

44. The limits to *Ziegler* were made clear in *DPP v Cuciurean* [2022] EWHC 736 (Admin) in which Lord Burnett CJ held that *Ziegler* did not impose an extra test in a case of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, as Article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier's rights under Article 1 of Protocol 1 ["*A1P1*"], by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway.

45. The right to peaceful enjoyment of one's property has been honoured by the Courts for centuries, albeit not described as a human right nor still less as A1P1. Article 10 and 11 rights have been described in numerous cases, from which I select only two examples:
    (1) In *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 Lord Justice Laws said [at 43]: "*Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them*."
    (2) In *Kudrevicius v Lithuania* (2015) 62 EHRR 34 [91] the European Court of Human Rights stated that "*the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression ……is one of the foundations of such a society. Thus, it should not be interpreted restrictively*"

46. In assessing the balance between competing rights in protest cases, it is not for the Court to choose between different political causes. In *City of London Corporation v Samede* [2012] PTSR 1624 Lord Neuberger, M.R., stated as follows [within 39 to 41]:

> As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public…… The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command…..the court cannot, indeed, must not, attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention . . . the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous…..Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom.

47. It is clear that once breach proceedings are under way, it is no defence for the alleged contemnor to argue that the injunction should not have been granted in the first place, or that its terms are too broad. The balance between property rights and the right of protestors is one that has to be struck when the injunction is granted [see *National Highways Ltd v Heyatawin and Others* [2021] EWHC 3078 (QB), at 44 and 45].

48. To draw together the various legal threads: in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*DPP v Jones* and *DPP v Ziegler*]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the Claimant's rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protestors to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*NHL v Heyatawin*].

49. My decision on the terms of the injunctions was communicated in discussion at the end of the hearing and in drafts sent between the parties and myself since. As the detail can be seen in the order, I confine my explanation to broader principles. The general character of the views held by IB protestors are properly described as "*political and economic*" and as such are at the "*top end of the scale*", as described in *Samede*, and the protests are non-violent; these matters weigh in favour of lawfulness. There are a number of matters, however, that go the other way. Having regard to the sort of criteria described in both *Samede* and *Ziegler*, there is no particular geographical significance to the protests, they are simply directed to where they will cause the most disruption. The public were completely prevented from travelling to their chosen destinations by previous protests; there was normally not, in contrast to the facts in *Ziegler*, an alternative route for other road users to take. While the protestors themselves have been uniformly peaceful, the extent of previous protests has caused an entirely predictable reaction from other road users, as described in Ms Higson's statement, above. Judging the future risks of protests against IB's past conduct I approved the terms of the draft injunctions that would ban the deliberate obstruction of the carriageways of the roads on the SRN but would not eliminate the possibility of lawful protests around or in the area on those roads.

Alternative service

50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first instance judgment in *Barking and Dagenham v People Unknown* [2021] EWHC 1201 (QB) Nicklin J [at 45-48, passages that were not the subject of criticism in the later appeal] stated that the Court should not grant an injunction against people unknown unless and until there was a satisfactory method of ensuring those who might breach its terms would be made aware of the order's existence.

51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB and other groups

with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence.

52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction.

Disclosure

53. The interim orders contained provisions requiring the various relevant police forces to provide NHL with the identities of those arrested in circumstances that suggest they may have breached the Court's order, and to also supply the evidence that showed the conduct before arrest. This strikes me as the most efficient way to provide the Claimant with the means to enforce their order, and subject to adding in some confidentiality clauses, I made those orders.

Declaration

54. NHL applied for a declaration to this effect:

> That the use of the SRN by the Defendants for the purposes of protest which causes an obstruction of the public highway is unlawful and a trespass in that it exceeds the lawful right of the public to use the highway and interferes unreasonably with the use of the highway by other members of the public entitled to use it

55. In deciding whether to make the declaration I have to take into account, in the words of Neuberger J [as he then was] in FSA *v Rourke* [2001] EWHC 704 (Ch), "*justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration*".

56. In my view this is not a case in which I should make such a declaration. After *Ziegler* it does not follow automatically in all cases that the use of the SRN for protests is unlawful or a trespass. While I could construct a proposition with caveats and qualifications, it would serve no useful purpose and might be positively unhelpful if it could be read as proffering some sort of arguable defence to contempt proceedings for the breach of the terms of the order that I have been prepared to grant. The injunction is already long and detailed and this judgment is designed to explain the reasoning behind it, and I see no reason to add any further explanation of the law.

Damages and costs

57. The Claimant has stated that they do not seek damages in this case. I have reserved the issue of costs and will give a hand down judgment once I have received written submissions under a timetable agreed at the end of the hearing.